IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Trauger** **Magistrate Judge Griffin** **JURY DEMAND**
Defendants.	)	

PLAINTIFF'S MOTION AND MEMORANDUM TO SUBSTITUTE SERVICE OF PROCESS FOR DEFENDANT EDWARD MAGEDSON

Plaintiff Energy Automation Systems, Inc. ("EASI") moves the Court for an order requiring counsel for Defendant Xcentric Ventures, LLC, d/b/a Badbusiness Bureau and/or badbusinessbureau.com and/or Rip-Off Report and/or ripoffreport.com ("Xcentric") to accept service of process on behalf of Defendant Edward Magedson ("Magedson").

In a prior filing, EASI chronicled Magedson's active avoidance of service of process in this case. (Doc. No. 27.) On June 11, 2007, this Court granted EASI's motion seeking an order requiring Xcentric – Magedson's company – to provide an address at which service of Magedson could be effected. (Doc. No. 44.) Xcentric's counsel has expressly acknowledged this obligation but has failed to comply with this Court's directive.

Faced with the very same Defendants' disregard of the procedures governing service of process, district courts in other states have ordered Maria Speth, Xcentric's lead counsel in this

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case and Magedson's longtime attorney, to accept service on Magedson's behalf. This Court should do the same and put an end to Defendants' considerable efforts to drive up the costs of serving Magedson.

Such service could be accomplished via email and certified mail return receipt requested, or by delivering a copy of the Complaint and Summons upon Xcentric's counsel at the case management conference scheduled for June 25, 2007.

If service cannot be accomplished by June 22, 2007, EASI requests that the Court grant an additional extension of time for service of the Complaint and Summons upon Magedson for thirty days following the Court's order on this Motion.

I. BACKGROUND[1]

On April 23, 2007, EASI moved the Court to extend until June 22, 2007, the time for service of the Summons and Complaint upon Magedson. (Doc. No. 27.) In that Motion, EASI also requested that this Court enter an order requiring Xcentric to provide an address for Magedson at which service may be effected. (Id. at 4-5.)

On June 11, 2007, the Court granted EASI's motion. (Doc. No. 44.) That same day, EASI's counsel sent via facsimile a letter to Xcentric's counsel requesting that Xcentric either provide an address for Magedson for the service of process or accept service on Magedson's behalf. A copy of the June 11, 2007 letter is attached hereto as Exhibit A. EASI asked for a response quickly so that it could accomplish service before the current deadline for service on June 22, 2007 and before the case management conference now scheduled on June 25, 2007.

Later that day, Xcentric's counsel via email acknowledged "as correct [EASI's counsel's] comment to the effect that the Court today granted EASI's motion seeking additional time to accomplish service and requiring that a valid address for service of process on Mr. Magedson be provided." A copy of the June 11, 2007 email is attached hereto as Exhibit B.

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[1] EASI's Motion and Memorandum for an Extension of Time for Service of Summons and Complaint upon Defendant Ed Magedson (Doc. No. 27) provides additional facts relating to the service issue. EASI incorporates those facts as if set forth herein.

On June 13, 2007 and again on June 15, 2007, EASI's counsel sent emails to Xcentric's counsel requesting an address or its authorization to accept service. Copies of the emails dated June 13 and 15, 2007 are attached hereto as Exhibits C and D respectively. Nonetheless, Xcentric's counsel has failed to comply with the Court's directive or respond to EASI's offer.

II. ARGUMENT

This Court should order Xcentric's counsel to accept service of process on Magedson's behalf. As detailed in EASI's motion for an extension of time to serve Magedson (Doc. No. 27), Magedson has gone to great lengths to avoid service of process in this and other litigation. In fact, EASI has attempted service upon him no fewer than nine times but has been thwarted by Magedson's willful avoidance of service. (Doc. No. 27 at 2.)

At the same time, Magedson has been in contact with Xcentric's counsel in this litigation, has submitted a nine-page declaration in this case and is the founder and "manager" of Xcentric. (See Declaration of Edward Magedson ("Magedson Decl."), Doc. No. 17.) Xcentric is further represented in this case by Magedson's longtime counsel, Maria Speth.[2]

Even after this Court ordered Xcentric to provide an address for its founder and manager at which service can be accomplished and Xcentric's counsel admitted that it was required to do so, Xcentric has failed to do so, apparently more devoted to Magedson's secrecy than complying with this Court's order.

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[2] Maria Speth has represented Magedson and Xcentric (or a predecessor entity) in numerous cases, including the following: Randell v. Badbusinessbureau.com, No. 2:03-cv-000848-FJM (D. Ariz. Filed May 6, 2003); Tolner v. Badbusinessbureau.com, No. 2:03-cv-00894 (D. Ariz. Filed May 13, 2003); Bears v. Badbusinessbureau.com, No. 2:03-cv-00895 (D. Ariz. filed May 13, 3003); Hy Cite v. Badbusinessbureau.com, No. 2:04-cv-02856 (D. Ariz. filed Dec. 10, 2004); Trans Cont. Talent v. Badbusinessbureau, No. 6:03-cv-00279-ACC (M.D. Fla. Filed March 7, 2003); Whitney Information v. Xcentric Ventures, No. 04-cv-00047 (M.D. Fla. Filed Nov. 13, 2006); George S. May Int'l v. Xcentric Ventures, No. 1:04-cv-06018 (N.D. Ill. Filed Sept. 15, 2004); MCW, Inc. v. www.badbusinessbureau.com, No. 3:02-cv-02727 (N.D. Tex. Filed Dec. 20, 2002).

Defendants' misconduct is not unique to this case and can be remedied through a simple, economical and effective procedure: ordering Xcentric's counsel to accept service on Magedson's behalf. District courts in other states have addressed this very same behavior on the part of Defendants and have ordered Speth to do so. (Doc. No. 27 at 4, attaching copies of relevant pleadings in George S. May Int'l Co. v. Xcentric Ventures, Inc., No. 04C6018 (N.D. Ill.); Hy Cite Corp. v. badbusinessbureau.com, L.L.C., No. CV04-2856 PHX EHC, Doc. No. 24 (D. Ariz. April 19, 2005) (copy attached)).

This method of service is authorized by applicable rules of civil procedure. Rule 4(e)(1) of the Federal Rules of Civil Procedure authorizes service "pursuant to the law of the state in which the district court is located, or in which service is effected . . . ." Rule 4.05(1)(b) of the Tennessee Rules of Civil Procedure provides that service may be made upon a defendant outside Tennessee "in any manner prescribed by the law of the state in which service is effected . . . ."

In his declaration, Magedson represented that he is a resident of Arizona. (Magedson Decl. ¶ 22, Doc. No. 17.) Rule 4.1(m) of the Arizona Rules of Civil Procedure provides in pertinent part:

> If service by one of the means set forth in the preceding paragraphs of this Rule 4.1 proves impracticable, then service may be accomplished in such manner, other than by publication, as the court, upon motion and without notice, may direct. Whenever the court allows an alternate or substitute form of service pursuant to this subpart, reasonable efforts shall be undertaken by the party making service to assure that actual notice of the commencement of the action is provided to the person to be served . . . .

Unquestionably, Magedson has actual notice of this lawsuit, and, indeed, "the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." Henderson v. United States, 517 U.S. 654, 672 (1996).

In sum, alternate service upon the counsel of Magedson's company is appropriate in light of EASI's diligence in attempting personal service, Magedson's actual notice of the pendency of the action, Magedson's active efforts to avoid service of process, the close relationship between Magedson, Xcentric and Xcentric's lead counsel, and Xcentric's noncompliance with this Court's order directing it to provide an address for Magedson at which service could be effected.

III. CONCLUSION

EASI respectfully requests that this Court order Xcentric's counsel to accept service on Magedson's behalf. If service cannot be accomplished by June 22, 2007, EASI requests that the Court grant an additional extension of time for service of the Complaint and Summons upon Magedson for thirty days following the Court's order on this Motion.

Respectfully submitted,

s/ W. Russell Taber
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing document was made via electronic mail using the Electronic Filing System upon the following:

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and via U.S. Mail, postage prepaid, upon the following:

Maria Crimi Speth
Jaburg & Wilk PC
3200 N Central Avenue
Suite 2000
Phoenix, AZ 85012

this 19th day of June, 2007.

s/ W. Russell Taber